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9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
11
12

13 **IMDb.COM, INC., a Delaware corporation,**
14
Plaintiff,

15 **v.**
16

17 **KATHLEEN A. KENEALY, in her official**
18 **capacity as Acting Attorney General of the**
State of California,¹
19 Defendant.

3:16-cv-06535

**OPPOSITION TO MOTION FOR
PRELIMINARY INJUNCTION**

Date: February 16, 2017
Time: 10:00 a.m.
Dept.: No. 4 – 17th Floor
Judge: Honorable Vince Chhabria
Trial Date: None
Action Filed: November 10, 2016

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27 ¹ Under Federal Rule of Civil Procedure 25(d), Acting Attorney General Kathleen A.
28 Kenealy is automatically substituted as a defendant in place of her predecessor, Kamala D. Harris.

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INTRODUCTION

Plaintiff IMDb.com, Inc. (“IMDb”) asks this Court to preliminarily enjoin the operation of Assembly Bill No. 1687, which the California Legislature passed to combat age discrimination in employment in the entertainment industry. The bill added section 1798.83.5 to the California Civil Code, which became effective on January 1, 2017.² The law limits the disclosure of date of birth and age information by certain commercial online entertainment employment service providers such as IMDb. The law imposes those limits by regulating the contracts for employment services between those online service providers and their paying subscribers.

Many Internet users likely know of IMDb, and its popular Web site <http://www.imdb.com/> (“IMDb.com”), which is effectively accessible to the public at no cost. A fewer number of those users are likely familiar with IMDb’s employment service, known as IMDbPro, and its accompanying Web site, which is accessible only to paying subscribers. Section 1798.83.5 applies to IMDb as a function of its operation of IMDbPro, because that is the paid commercial service that involves a “contractual agreement” that triggers the statute’s limitations. But the law’s nondisclosure requirement applies across the IMDb platform as a whole, so to speak. This includes both IMDbPro – as the actual employment service – and IMDb.com – as a “companion” Web site under the control of IMDb under section 1798.83.5.

IMDb points out, and Defendant has no reason to dispute, that even without AB 1687 IMDbPro users are free to manage their own online profiles and make content decisions, including whether to display date of birth and age information. Yet IMDb takes issue with section 1798.83.5’s prohibition against the disclosure of such information on the IMDb.com, claiming a First Amendment right to publicize what it calls “factual age information.” Pl.’s Mot. for Prelim. Inj. (“Pl.’s Mot.”) at 1. However, IMDb has failed to demonstrate any likelihood of success on its First Amendment claim.

Simply stated, section 1798.83.5 involves a contract-based nondisclosure rule. It is a valid regulation of voluntary commercial contracts, and any incidental effect on speech does not

² All further statutory references are to the California Civil Code unless otherwise indicated.

1 implicate a First Amendment right. State regulation of commercial contracts is unremarkable,
2 and IMDb should not be allowed to shield its commercial contract activity from legitimate
3 commercial regulation simply by linking it with its own free, public information Web site.
4 Finally, even if the law implicates the First Amendment, which it does not, it is nonetheless a
5 lawful regulation of commercial speech. Section 1798.83.5 is a regulation that is no more
6 extensive than necessary to further California's substantial, indeed compelling, state interest in
7 combatting age discrimination.

8 IMDb also has failed to demonstrate any likelihood of success on its Commerce Clause or
9 federal statutory preemption claim. With respect to the Commerce Clause claim, section
10 1798.83.5 is valid because it does not directly regulate interstate commerce. Regarding the
11 preemption claim, section 1798.83.5 is not preempted because the federal Communications
12 Decency Act of 1996 does not apply to the matters regulated by section 1798.83.5.

13 Because IMDb's claims lack merit, there is no possibility of irreparable injury to IMDb if
14 its motion is denied. In addition, the balance of hardships and the public interest against age
15 discrimination strongly counsel in favor of upholding the operation of the law as intended by the
16 People's representatives. The Court therefore should deny IMDb's motion in its entirety.

17 **BACKGROUND**

18 **I. SECTION 1798.83.5 (AB 1687)**

19 Although it became effective earlier this year, the Legislature passed AB 1687 last year and
20 the Governor approved it on September 24, 2016.

21 Section 1798.83.5 governs contracts between "commercial online entertainment
22 employment service providers" and their paying subscribers. As defined by the law, a
23 "commercial online entertainment employment service provider" is "a person or business that
24 owns, licenses, or otherwise possesses computerized information, including, but not limited to,
25 age and date of birth information, about individuals employed in the entertainment industry,
26 including television, films, and video games, and that makes the information available to the
27 public or potential employers." § 1798.83.5(d)(1). A "subscriber" is "a natural person who
28 enters into a contractual agreement with a commercial online entertainment employment service

1 provider to receive employment services in return for a subscription payment.”

2 § 1798.83.5(d)(4).

3 The express purpose of the law is “to ensure that information obtained on an Internet Web
4 site regarding an individual’s age will not be used in furtherance of employment or age
5 discrimination.” § 1798.83.5(a). To that end, the statute, provides:

6 A commercial online entertainment employment service provider that enters into a
7 contractual agreement to provide employment services to an individual for a
8 subscription payment shall not, upon request by the subscriber, do either of the
9 following:

9 (1) Publish or make public the subscriber’s date of birth or age information in an
10 online profile of the subscriber.

11 (2) Share the subscriber’s date of birth or age information with any Internet Web
12 sites for the purpose of publication.

13 § 1798.83.5(b).

14 Under the statute, a commercial online entertainment employment service provider subject
15 to the above requirement “shall, within five days, remove from public view in an online profile of
16 the subscriber the subscriber’s date of birth and age information on any companion Internet Web
17 sites under its control upon specific request by the subscriber naming the Internet Web sites.”

18 § 1798.83.5(b) Any such service provider “that permits members of the public to upload or
19 modify Internet content on its own Internet Web site or any Internet Web site under its control
20 without prior review by that provider shall not be deemed in violation of this section unless first
21 requested by the subscriber to remove age information.” *Id.*

22 **II. PLAINTIFF’S COMPLAINT**

23 **A. The Parties**

24 Plaintiff IMDb operates <http://www.imdb.com/> (“IMDb.com”), a publically-accessible
25 online information database regarding films, television shows, and professionals in the
26 entertainment industry. Compl. at 2. The information available on IMDb.com is provided by
27 IMDb itself along with users of the site, although IMDb routinely updates and verifies
28 information provided by users. *Id.*

IMDb also operates IMDbPro, a subscription service that allows industry professionals to create their own profile pages, including a résumé, for example, and to access job listings, company information, and information regarding other industry professionals. Compl. at 2-3.

Defendant Kathleen A. Kenealy is sued in her official capacity as Acting Attorney General of the State of California. *See* Compl. at 5 & n.1, *supra*. As the chief law officer for California, she is authorized to enforce state law, including section 1798.83.5.

B. Plaintiff's Claims

IMDb advances three claims in connection with the instant motion. The first is that section 1798.83.5 is a content-based regulation of speech that violates the First Amendment because it is not narrowly drawn to serve a compelling state interest. *See* Compl. at 10-11. The second claim is that the law violates the Commerce Clause because it is not limited “to conduct in and related to California.” Compl. at 13. The third claim is that section 230(c)(1) of the Communications Decency Act (“CDA”) preempts section 1798.83.5, which IMDb argues impermissibly imposes liability on it for content created by a third party.

APPLICABLE LEGAL STANDARDS

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Alternatively, in the Ninth Circuit, “[a] preliminary injunction is appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff’s favor.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). Plaintiffs must make a showing of all four *Winter* factors even under this alternative test. *Id.* at 1132, 1135.

“A preliminary injunction is an extraordinary remedy never awarded as a matter of right. In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Winter*, 555 U.S. at 24 (internal quotations and citations

omitted). Because a preliminary injunction is an extraordinary remedy, the moving party must establish the necessary elements by a “clear showing.” *Winter*, 555 U.S. at 22. A plaintiff’s burden is particularly heavy when, as here, it seeks to enjoin operation of a statute because “it is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined.” *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997). “A strong factual record is therefore necessary before a federal district court may enjoin a State agency.” *Cupolo v. Bay Area Rapid Transit*, 5 F. Supp. 2d 1078, 1085 (N.D. Cal. 1997).

ARGUMENT

I. PLAINTIFF HAS NO LIKELIHOOD OF SUCCESS ON THE MERITS.

A. Plaintiff will not succeed on its free speech claim.

1. Because section 1798.83.5 regulates contracts between employment service providers and their paying subscribers, as opposed to speech, the First Amendment does not apply.

As the party invoking the First Amendment, IMDb first must demonstrate that it applies at all to the regulated action. *See, e.g., Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984) (“it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies”). Because section 1798.83.5 regulates economic contractual relationships, not protected speech, IMDb cannot meet its burden.

The First Amendment is not a source of “limitless” protection, not even for the publication of truthful information acquired lawfully. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991). In *Cohen*, the Supreme Court held that the First Amendment did *not* prohibit a plaintiff from recovering damages, under a state promissory estoppel law, for a newspaper’s breach of a promise of confidentiality given to the plaintiff in exchange for information. *Id.* at 665. The Court reasoned, in part, that the law was one of general applicability that had “incidental effects” on the newspaper’s ability to gather and report the news. *Id.* at 669. Moreover, the Court was persuaded by the fact that the agreement between the plaintiff and the newspaper was in the form of a contract. As the Court put it: “The parties themselves . . . determine the scope of their legal obligations, and any restrictions that may be placed on the publication of truthful information are self-imposed.” *Id.* at 671.

1 The Court should apply similar reasoning here. While section 1798.83.5 may not be a
 2 generally applicable law, the key point is that it has only “incidental effects,” if any, on IMDb’s
 3 ability to publish factual information. *Cohen*, 501 U.S. at 669. Section 1798.83.5 is hardly
 4 sweeping in its scope. It narrowly proscribes the disclosure of a discreet category of private,
 5 sensitive information.³ And the only reason the proscription extends to the publicly-accessible
 6 IMDb.com (as opposed to only IMDbPro), is a result of IMDb’s decision to effectively conjoin
 7 their two products. Such an arrangement cannot be used to insulate IMDb from a legitimate
 8 business regulation. After all, a subscriber pays a fee to IMDbPro, effectively “hiring” the
 9 service to host his or her online profile, assist with business connections, access and facilitate
 10 employment opportunities, and so on. And it is undisputed that IMDbPro allows a paying
 11 subscriber to omit any mention of date of birth or age information from his or her profile. Thus,
 12 there is a basic unfairness to allowing IMDb to turn around and publish that same information on
 13 another site it owns and controls, not to mention makes freely available, just because it happens to
 14 be outside the subscription. Section 1798.83.5 guards against that unfairness by requiring IMDb
 15 – the company that entered into a contract with a paying subscriber to provide employment
 16 services – to remove date of birth or age information across all of the sites it controls, if that is
 17 what a paying subscriber chooses to do.

18 To be sure, the plain language of section 1798.83.5 places it in the category of a regulation
 19 of economic contracts between private parties. In relevant part, the law applies to any
 20 commercial online entertainment service provider “*that enters into a contractual agreement to*
 21 *provide employment services.*” §1798.83.5(b) (italics added). Similarly, it applies to any
 22 “subscriber” to those services, who the law defines as “a natural person *who enters into a*

23
 24 ³ The record does not support plaintiff’s characterization of date of birth or age information
 25 as “public information.” Pl.’s Mot. at 2 & 10. Plaintiff has submitted no evidence on that point.
 26 Moreover, in many contexts such information is deemed private and not subject to disclosure.
 27 *See, e.g., True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 736–37 (S.D. Miss. 2014) (“various
 28 courts have recognized in the context of FOIA litigation that birthdates are sensitive information
 and have construed FOIA’s “Exemption 6” to protect the disclosure of birthdates”); Fed. R. Civ.
 P. 5.2(a)(2) (requiring certain age information be redacted from court filings for privacy reasons).

1 *contractual agreement* with a commercial online entertainment employment service provider to
 2 receive employment services in return for a subscription payment.” § 1798.83.5(d)(4) (italics
 3 added). Accordingly, IMDb has no basis upon which to complain of a First Amendment
 4 violation. *See Cohen*; 501 U.S. at 670-71; *see also DVD Copy Control Ass’n, Inc. v. Bunner*, 31
 5 Cal. 4th 864, 895 (2003) (“Both the United States Supreme Court and this court have recognized
 6 that the First Amendment right to free expression may be legitimately circumscribed by state law
 7 intellectual property rights.”). Indeed, as a general matter, states have considerable leeway in
 8 regulating contracts between private parties. *See, generally, Allied Structural Steel Co. v.*
 9 *Spannaus*, 438 U.S. 234, 241 (1978) (“It is the settled law of this court that the interdiction of
 10 statutes impairing the obligation of contracts does not prevent the State from exercising such
 11 powers as are vested in it for the promotion of the common weal, or are necessary for the general
 12 good of the public[.]”); *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 22 (1977) (states have
 13 “broad power to adopt general regulatory measures without being concerned that private contracts
 14 will be impaired, or even destroyed, as a result”).⁴

15 Additionally, while section 1798.83.5 subjects contracts between IMDb and its paying
 16 subscribers to a particular kind of regulation, it cannot reasonably be questioned that those
 17 contracts are voluntary. IMDb and its paying subscribers mutually agree to enter into contracts
 18 for employment services, with each side remaining free not to enter into any contract in the first
 19 place. Thus, the decision to contract is “self-imposed.” *Cohen*, 501 U.S. at 671.

20 Finally, acceptance of IMDb’s First Amendment theory here would imperil a host of similar
 21 nondisclosure laws that apply in the context of voluntary consumer transactions. *See, e.g.,*
 22 18 U.S.C. § 2710 (limiting disclosure of personal information in video tape rental or sale
 23 records); 47 U.S.C. § 551 (regulating collection, use, and disclosure by cable operators of
 24 “personally identifiable” information regarding cable subscribers); 20 U.S.C. 1232g (concerning
 25 “release of education records (or personally identifiable information therein)”; 15 U.S.C. §§

26
 27 ⁴ Plaintiff’s reliance on *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015) is
 28 misplaced. *Reed* concerned restrictions on signs and billboards aimed at the general public. The
 case casts no doubt on *Cohen*, or these other commercial contract precedents.

6501-6506 (Children’s Online Privacy Protection Act requirements governing disclosure of personal information). *See also* Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. Rev. 1194-96 (2005) (commercial nondisclosure or confidentiality rules generally have never been thought to fall within the scope of the First Amendment’s protection). For this reason as well, the Court should reject IMDb’s theory.

2. Even if section 1798.83.5 concerns speech, it is a permissible regulation of commercial speech.

Even assuming this is a First Amendment case, which it is not, section 1798.83.5 concerns commercial speech. Commercial speech is an “expression related solely to the economic interests of the speaker and its audience,” or, alternatively, speech “proposing a commercial transaction.” *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm. of New York*, 447 U.S. 557, 560 (1980). The Supreme Court has recognized that this definition is hardly precise and it is often difficult to distinguish between commercial and noncommercial speech. *See Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993) (recognizing difficulty of “drawing bright lines that will clearly cabin commercial speech in a distinct category”).

IMDb argues that this case concerns speech unconnected to a business transaction. On the contrary, by its terms the statute regulates speech only in the context of contractual agreements between entities like IMDb and its paying subscribers. Additionally, because such contracts concern the provision of *employment* services by businesses like IMDb, and the receipt of such services by paying subscribers, any speech in connection with those contracts concerns the economic interests of the parties to those transactions. Thus, if section 1798.83.5 regulates speech at all, it regulates commercial speech. *See, generally, Connecticut Bar Ass’n v. United States*, 620 F.3d 81, 94 (2d Cir. 2010) (concluding that “the contract requirements of [a federal statute] qualify as commercial speech”).

Accordingly, the strict scrutiny urged by IMDb does not apply. Rather, the less-than-strict review under *Central Hudson* applies. In *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980), the Supreme Court set out the four-part First Amendment test applicable to a statute regulating commercial speech. As the Court explained:

At the outset, we must determine [1] whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 566.

Here, the first and second parts of the *Central Hudson* test are not at issue. At this stage of the proceedings, it does not appear that the relevant date of birth or age information is either misleading or related to unlawful activity. Nor is there any dispute that combatting age discrimination in employment is a substantial and compelling state interest. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 536 (1989) (remedying past discrimination is a compelling interest); *E.E.O.C. v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620-621 (9th Cir. 1988) (same). Thus, any *Central Hudson* analysis turns on the third and fourth parts of the applicable test.

With regard to the third part, that the regulation directly advance the government's interests, California is required to point to something more than "mere speculation or conjecture" to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Greater New Orleans Broad. Ass'n v. U.S.*, 527 U.S. 173, 188 (1999) (citation omitted). Related, the fourth part of the test asks whether the speech restriction is more extensive than necessary to serve the interests that support it. *Id.* This element does not require that California adopt the least restrictive means for achieving its objectives. *Board of Trs. v. Fox*, 492 U.S. 469, 480, (1989); *Outdoor Sys. Inc. v. City of Mesa*, 997 F.2d 604, 610 (9th Cir. 1993). Rather, there need only be a "reasonable fit" between the government's ends and the means chosen to accomplish those ends. *Fox*, 492 U.S. at 480; *see Greater New Orleans Broad. Ass'n*, 527 U.S. at 188 (requiring "a fit that is not necessarily perfect, but reasonable").

The Legislature passed AB 1687 to address age discrimination in the entertainment industry, which "remains a problem" despite the state's civil rights laws. Sen. Rules Com., Analysis of Assem. Bill No. 1687 (2015-2016 Reg. Sess.) Aug. 3, 2016, at 3; *see* Sen. Com. on

Judiciary, Analysis of Assem. Bill No. 1687 (2015-2016 Reg. Sess.) June 14, 2016, at 1 (despite laws like Fair Employment and Housing Act and Unruh Civil Rights “age discrimination remains a problem in the entertainment industry”); Assem. Com. on Privacy & Consumer Protection, Analysis of Assem. Bill No. 1687 (2015-2016 Reg. Sess.) May 3, 2016, at 2 (“age discrimination continues to exist and is facilitated through public distribution of potential job applicant’s birth and age information via commercial online employment service providers”).⁵

Thus, IMDb’s argument that the State simply needs to enforce its current age discrimination laws falls short. The Legislature determined that, in this particular industry, those laws have proven insufficient to eliminate discrimination. As a further remedial measure, AB 1687 was designed to limit the availability of age information of entertainment industry professionals. As the author of the bill observed, “[i]n particular, actors are often cast in roles in which they portray characters who are younger or older than their real biological age. . . . As actors age, they are very concerned that they will be shut out from parts based on unlawful age bias.” Sen. Rules Com., Analysis of Assem. Bill No. 1687 (2015-2016 Reg. Sess.) Aug. 3, 2016, at 4.

The restriction also is no more extensive than necessary. It only applies to commercial online entertainment employment service providers and subscribers who enter into contractual agreements for employment services. Thus, if the law regulates speech, at most it comes into play in a relatively limited context, paid employment services specific to the entertainment industry. Third parties to the contractual agreements (i.e., those outside of the voluntary, mutually beneficial agreements like those between IMDb and its paying subscribers) are not covered by the law. The provisions also limit access to age information only, a limited category of information.

⁵ This legislative history is attached to the declaration of the undersigned filed in support of this opposition. Under Rule 201 of the Federal Rules of Evidence, the Court may take judicial notice of the legislative history of state statutes. *Anderson v. Holder*, 673 F.3d 1089, 1094, n.1 (9th Cir. 2012); *Louis v. McCormick & Schmick Restaurant Corp.*, 460 F. Supp. 2d 1153, 1155, n.4 (C.D. Cal. 2006). The Acting Attorney General respectfully requests that this Court take judicial notice of the relevant legislative history here.

1 The text of section 1798.83.5 and its legislative history show that the Legislature
 2 understood the problem of age discrimination in the entertainment industry to be real, adopted the
 3 provision to aid in solving that problem, and matched the restriction to the problem to be
 4 addressed. Thus, if section 1798.83.5 is to be considered a speech regulation, it is a valid
 5 commercial speech regulation.

6 **B. Plaintiff will not succeed on its Commerce Clause claim because**
 7 **section 1798.83.5 does not directly regulate interstate commerce.**

8 “The Supreme Court has outlined a ‘two-tiered approach to analyzing state economic
 9 regulation under the Commerce Clause.’” *Valley Bank of Nevada v. Plus Sys., Inc.*, 914 F.2d
 10 1186, 1189 (9th Cir. 1990) (quoting *Brown-Forman Distillers Corp. v. New York State Liquor*
 11 *Auth.*, 476 U.S. 573, 578-79 (1986)).

12 When a statute directly regulates or discriminates against interstate commerce, or
 13 when its effect is to favor in-state economic interests over out-of-state interests, we
 14 have generally struck down the statute without further inquiry. When, however, a
 15 statute has only indirect effects on interstate commerce and regulates
 evenhandedly, we have examined whether the State’s interest is legitimate and
 whether the burden on interstate commerce clearly exceeds the local benefits.

16 *Brown-Forman Distillers Corp.*, 476 U.S. at 579 (citations omitted).

17 IMDb argues that section 1798.83.5 is “per se” invalid because it directly regulates
 18 interstate commerce.⁶ As the Ninth Circuit has explained, “direct regulation of interstate
 19 commerce ‘occurs when a state law directly affects transactions that take place across state lines
 20 or entirely outside of the state’s borders.’” *Greater Los Angeles Agency on Deafness, Inc. v.*
 21 *Cable News Network, Inc.*, 742 F.3d 414, 432 (9th Cir. 2014) (quoting *Valley Bank of Nev.*, 914
 22 F.2d at 1189–90.) The Commerce Clause “forbids a state from regulating commerce ‘that takes
 23 place wholly outside of the State’s borders, whether or not the commerce has effects within the
 24 State.’ [Citation.] In determining whether the [statute] directly regulates interstate commerce, we
 25 focus our inquiry on the ‘practical effect’ of the statute. [Citations.]” *Greater Los Angeles*
 26 *Agency on Deafness*, 742 F.3d at 432–33.

27 _____
 28 ⁶ Plaintiff advances no argument under the alternative balancing approach.

IMDb argues that section 1798.83.5 regulates commerce that takes place wholly outside California’s borders, or more precisely, that “AB 1687 is not limited to conduct that has a sufficient nexus to California.” Pl.’s Mot. at 10. Yet even IMDb’s own hypothetical transaction – which involves a user in Germany, an actor in California, and IMDb, which unquestionably does business in California – does not support that assertion. Indeed, “there is nothing unusual or unconstitutional per se about a state or county regulating the in-state conduct of an out-of-state entity when the out-of-state entity chooses to engage the state or county through interstate commerce.” *Pharm. Research & Mfrs. of Am. v. Cty. of Alameda*, 768 F.3d 1037, 1043–44 (9th Cir. 2014) (county ordinance requiring pharmaceutical companies doing business in the county to establish a prescription drug disposal program was not impermissible extraterritorial regulation).

Additionally, IMDb has failed to show an inability to create a California version of its Internet site which would avoid the potential for any Commerce Clause violation. The Ninth Circuit rejected a commerce clause challenge to a California law requiring closed-captioning on a network’s Web site for precisely this reason. *See Greater Los Angeles Agency on Deafness*, 742 F.3d at 433 (“CNN could enable a captioning option for California visitors to its site, leave the remainder unchanged, and thereby avoid the potential for extraterritorial application of the [statute]”); *see also Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 961 (N.D.Cal. 2006) (“NFB ”) (rejecting Commerce Clause challenge because “Target could choose to make a California-specific website” and even if Target changed “its entire Web site in order to comply with California law, this does not mean that California is regulating out-of-state conduct”).⁷

Finally, if this Court were to accept IMDb’s Commerce Clause theory, almost every California consumer protection applicable in an online context could be considered unconstitutional. Yet the Commerce Clause “is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities

⁷ IMDb’s unsupported, one-sentence assertion that this is “technologically unfeasible” (Decl. of Giancarlo Cairella ¶ 12) is conclusory and speculative, as is its claim that section 1798.83.5 will somehow require it to “modify its content in order to comply with each state’s regulatory scheme.” Pl.’s Mot. at 10. *See Greater Los Angeles Agency on Deafness*, 742 F.3d at 432-33 & n.9 (rejecting similar contentions).

1 must be the province of private market competition.” *United Haulers Ass’n, Inc. v. Oneida-*
 2 *Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007). This is particularly true in fields
 3 traditionally subject to state regulation, like consumer protection. *Id.* at 344; *see SPGGC, LLC v.*
 4 *Blumenthal*, 505 F.3d 183, 195 (2d Cir. 2007) (“The fact that an ordinary commercial transaction
 5 happens to occur in cyberspace does not insulate it from otherwise applicable state consumer
 6 protection laws.”)

7 **C. Plaintiff will not succeed on its federal statutory claim because the**
 8 **immunity provided by section 230 of the CDA does not apply.**

9 “Section 230 of the CDA immunizes providers of interactive computer services against
 10 liability arising from content created by third parties: ‘No provider ... of an interactive computer
 11 service shall be treated as the publisher or speaker of any information provided by another
 12 information content provider.’” *Fair Hous. Council of San Fernando Valley v. Roommates.Com,*
 13 *LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (*Roommates*) (quoting 47 U.S.C. § 230(c) (footnotes
 14 omitted). Yet “[t]his grant of immunity applies only if the interactive computer service provider
 15 is not also an ‘information content provider,’ which is defined as someone who is ‘responsible, in
 16 whole or in part, for the creation or development of’ the offending content.” *Id.* (quoting 47
 17 U.S.C. § 230(f)(3)).

18 Even assuming IMDb qualifies as an “interactive computer service” and that
 19 section 1798.83.5 seeks to treat IMDb as a “publisher or speaker,” which Defendant does not
 20 concede, IMDb has failed to show that it is not also an “information content provider.” On the
 21 contrary, the record shows that IMDb *is* an “information content provider” subject to liability.
 22 IMDb does not simply “passively display” content created entirely by third parties. *See*
 23 *Roommates*, 521 F.3d at 1162 (“If it passively displays content that is created entirely by third
 24 parties, then it is only a service provider with respect to that content.”) Rather, it creates some of
 25 its content entirely on its own in the first instance. *See* Compl. at 2 (alleging that only majority of
 26 relevant information, as opposed to all of it, is contributed by IMDb.com users). And with
 27 respect to other content that may be added by third parties, the record shows that IMDb routinely
 28 monitors, updates, and edits for accuracy all of the information on its site (i.e., its an active

curator of the content). *See id.* at 2 (“IMDb routinely and gladly updates information on IMDb.com in order to correct verified inaccuracies.”) & 6 (“IMDb.com maintains a ‘Database Content Team’ that manually monitors third party contributions for accuracy, and has also developed software to ensure that all of the information on IMDb is as accurate as possible.”) Cairella Decl. ¶ 6 (discussing “Database Content Team”).

Accordingly, IMDb is an “information content provider” subject to liability for the content it displays. *See Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1225–26 (N.D. Cal. 2014) (professional networking site LinkedIn is “information content provider” not entitled to CDA immunity); *Cf. F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1195 (10th Cir. 2009) (“prototypical service qualifying for this statutory immunity is an online messaging board (or bulletin board) on which Internet subscribers post comments and respond to comments posted by others”).

II. PLAINTIFF FAILS TO MEET THEIR BURDEN TO DEMONSTRATE IRREPARABLE HARM

IMDb has not met its burden to demonstrate irreparable injury. IMDb argues that “AB 1687 directly infringes IMDb’s First Amendment rights” and that irreparable injury will result “if it is required to submit to and comply with an unconstitutional law.” Pls.’ Mot. at 13. However, as discussed above, the law does not implicate IMDb’s free speech rights, and even if it did, it survives the applicable level of scrutiny. IMDb is correct that an alleged constitutional infringement may alone constitute irreparable harm. But where a constitutional claim is unsupported and fails as a matter of law, which is the situation here, the alleged infringement is “too tenuous” to support the requested relief. *Goldie’s Bookstore, Inc. v. Superior Ct.*, 739 F.2d 466, 472 (9th Cir. 1984).

Also, “Plaintiff’s long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm.” *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985). The Legislature passed AB 1687 in September of last year, and section 1798.83.5 went into effect on January 1 of this year. IMDb could have sought an injunction at any time over the last four months if there was any urgency to the request. Its failure to do so speaks clearly to the lack of hardship to comply with the statute. *See Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1092 n. 27 (3rd Cir.1984) (“[T]he district court may

1 legitimately think it suspicious that the party who asks to preserve the status quo through interim
2 relief has allowed the status quo to change through unexplained delay.”).

3 **III. THE BALANCE OF HARDSHIPS AND PUBLIC INTEREST WEIGH AGAINST GRANTING**
4 **PRELIMINARY RELIEF.**

5 IMDb cannot establish sufficient harm to outweigh the fact that “[a]ny time a State is
6 enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a
7 form of irreparable injury.” *Maryland v. King*, 133 S.Ct. 1, 3 (2012) (Roberts, J., in chambers,
8 quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977)
9 (Rehnquist, J., in chambers)). Additionally, IMDb’s claim of undue burden in complying with
10 the law lacks credibility, considering the preexistence of an entire Database Content Team,
11 manual monitoring of Web site content, and software monitoring. *See* Compl. at 6. Indeed,
12 IMDb touts its abilities to operate an online database that it describes as “the most comprehensive
13 and authoritative public source of information regarding the motion picture and television
14 industries, which is used by hundreds of millions of people worldwide.” Compl. at 2.

15 Finally, if this Court were to enjoin the law, it would harm those consumers who continue
16 to face age discrimination in the entertainment industry. *See* Sen. Com. on Judiciary, Analysis of
17 Assem. Bill No. 1687 (2015-2016 Reg. Sess.) June 14, 2016, at 1; Assem. Com. on Privacy &
18 Consumer Protection, Analysis of Assem. Bill No. 1687 (2015-2016 Reg. Sess.) May 3, 2016,
19 at 2. While IMDb suggests that these are simply professional actors well-known to the public, it
20 also includes many lesser-known actors and other entertainment industry professionals who
21 struggle against age discrimination.

22 **CONCLUSION**

23 For the reasons set forth above, the Court should deny IMDb’s motion.

24 Dated: January 19, 2017

Respectfully Submitted,

25 */s/ Anthony R. Hakl*

26 ANTHONY R. HAKL

Deputy Attorney General

27 *Attorney for Defendant*

CERTIFICATE OF SERVICE

Case Name: **IMDb.com, Inc. v. Kamala
Harris**

No. **3:16-cv-06535**

I hereby certify that on January 19, 2017, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 19, 2017, at Sacramento, California.

Tracie L. Campbell
Declarant

Tracie Campbell
Signature